

Complaint

55 F.T.C.

IN THE MATTER OF
POINT ADAMS PACKING CO., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF SECS. 2(c) AND 2(d) OF THE CLAYTON ACT

Docket 7210. Complaint, July 23, 1958—Decision, Dec. 5, 1958

Consent order requiring a canner of sea food products in Hammond, Ore., and a broker in New York City, to cease violating the brokerage section of the Clayton Act by reducing the net price to certain buyers by reduction of brokerage, by passing on payments out of brokerage as rebates for part of advertising or promotional allowances, and by passing on a part of the brokerage by agreement between the seller and broker to share one-half of price reductions granted in the form of promotional allowances; and to cease violating Sec. 2(d) of the Act by making special advertising allowances to certain favored customers but not to their competitors.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly designated and described, have been and are now violating the provisions of subsections (c) and (d) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

Count I

PARAGRAPH 1. Respondent Point Adams Packing Co., hereinafter referred to as Point Adams or as seller respondent, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oregon, with its principal office and place of business located at Hammond, Ore. Respondent Point Adams has been for the past several years, and is now, engaged in canning, packing, selling and distributing salmon, tuna and crab meat, all of which are hereinafter referred to as seafood products. Seller respondent is a substantial distributor of seafood products, particularly Columbia River Salmon.

Respondent Charles L. Rogers, Sr., is an individual and is president and general manager of the seller respondent, with his principal office and place of business the same as that of the seller respondent. Respondent Rogers owns a substantial amount of the outstanding capital stock of the seller respondent, and as

president and general manager and as substantial owner, exercises authority and control over the seller respondent and its business practices and policies, including its sales and distribution policies. He is included in any reference hereinafter made to seller respondent.

PAR. 2. Respondent Trubenbach & Scheffold, Inc., hereinafter sometimes referred to as the broker respondent, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 100 Hudson Street, New York, N.Y. Respondent is now and for the past several years has been engaged in the brokerage business representing a number of West Coast packers of fruit, vegetable and seafood products, including respondent Point Adams Packing Co.

Respondents Edward H. Trubenbach and Joseph W. Scheffold are individuals and are president and vice president, respectively, of the broker respondent, with their principal office and place of business the same as that of said broker respondent. These individual respondents own all or substantially all of the outstanding stock of said broker respondent, and as officers and owners exercise authority and control over its business practices and policies, including its sales and distribution policies. They are included in any reference hereinafter made to broker respondent.

PAR. 3. In the course and conduct of their businesses, respondents, both seller and broker, for the past several years have sold and distributed, and are now selling and distributing seafood products in commerce, as "commerce" is defined in the aforesaid Clayton Act, to buyers located in the several states of the United States, other than the states in which respondents are located. Said respondents transport, or cause such seafood products when sold, to be transported from their place of business or warehouse in the State of Washington, or elsewhere, to buyers or to the buyers' customers located in various other States of the United States. There has been at all times mentioned herein a continuous course of trade in commerce in said seafood products across state lines between respondents and the respective buyers of said products.

PAR. 4. The seller respondents, both corporate and individual, for the past several years have sold and distributed, and are now selling and distributing, their seafood products in commerce to buyers through brokers. The seller respondents pay these brokers, including the broker respondents named herein, for their

Complaint

55 F.T.C.

services in effecting such sales, a brokerage or commission usually at the rate of 5 percent of the net selling price of the product, except for crab meat which is usually at the rate of 2½ percent of the net selling price.

In a number of instances, however, both the seller respondents and the broker respondents, in the course and conduct of their business, have made payments, grants, allowances or rebates in substantial amounts in lieu of brokerage or have made price concessions which reflect brokerage to certain buyers.

Among and including, but not necessarily limited to, the methods or means employed by respondents in so doing are the following:

(a) By reducing the net price to certain buyers on which sales the brokerage or commission to the broker was reduced by approximately the same amount as the price reduction.

(b) By the broker respondents passing on to certain buyers out of their brokerage earned or received, in the form of rebates or other payments for part of advertising or promotional allowances agreed to by and between the seller and the broker respondents.

(c) By the broker respondents passing on to certain buyers a part of their brokerage or commissions earned or received by agreeing with the seller respondents to share one-half of certain reductions in price granted to said buyers in the form of promotional allowances.

PAR. 5. The acts and practices of both the seller respondents and the broker respondents, both corporate and individual, as herein alleged and described constitute a violation of the provision of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13).

Count II

PAR. 6. Each of the allegations contained in paragraphs 1 and 3 of this complaint, insofar as they pertain to the seller respondent, are here realleged and incorporated in this count the same as if they were set forth in full.

PAR. 7. The seller respondents both corporate and individual, in the course and conduct of their business, have been and are now paying advertising and promotional allowances to certain favored buyers without making such allowances available on proportionally equal terms to all other buyers competing in the distribution of their products.

For example the seller respondents have agreed to payments being made to at least one favored customer in the State of Pennsylvania as a special advertising or proportional allowance without agreeing to such payments being made available on proportionally equal terms or in fact on any terms, or in any amounts to other customers competing with the favored customer in the resale of the seller respondents' products. These payments were made by seller respondents on a flat monthly basis for a certain period of time at the rate of \$50 per month. No such payments were made or even offered on proportionally equal terms or in fact on any terms to customers competing with the favored customer in the resale of the seller respondents' products.

Another example of such practice occurred in the State of New Jersey where the seller respondents agreed to a flat payment of \$750 as a special advertising allowance to one favored customer without agreeing to such payment being made on proportionally equal terms to other customers competing with the favored customer in the resale of the seller respondents' seafood products. Two-thirds of this amount, or \$500, was paid by the seller respondents and the other one-third, or \$250, was paid by the broker respondents out of their brokerage. No such payments were made on proportionally equal terms or amounts, nor were any offered to customers competing with the favored customer in the resale of the seller respondents' seafood products.

PAR. 8. The acts and practices of the seller respondents, both corporate and individual, as hereinabove alleged and described constitute a violation of the provisions of subsection (d) of Section 2 of the Clayton Act, as amended (U.S.C., Title 15, Sec. 13).

Mr. Cecil G. Miles for the Commission.

Mr. Milton Lang, of New York, N.Y., for respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) issued its complaint herein, charging the above-named respondents with having violated the provisions of subsections (c) and (d) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13). The respondents were duly served with process and the initial hearing canceled pending negotiations for settlement between the parties.

On October 10, 1958, there was submitted to the undersigned hearing examiner of the Commission for his consideration and

Decision

55 F.T.C.

approval an "Agreement Containing Consent Order to Cease and Desist," which had been entered into by and between respondents and the attorneys for both parties, under date of October 9, 1958, subject to the approval of the Bureau of Litigation of the Commission. Such agreement had been thereafter duly approved by that Bureau.

On due consideration of the said "Agreement Containing Consent Order to Cease and Desist," the hearing examiner finds that said agreement, both in form and in content, is in accordance with §3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and that, by said agreement, the parties have specifically agreed that:

1. Respondent Point Adams Packing Co., is a corporation existing and doing business under and by virtue of the laws of the State of Oregon, with its office and principal place of business located in the town of Hammond, State of Oregon.

Respondent Charles L. Rogers, Sr., is an individual and is an officer of respondent Point Adams Packing Co., with his office and principal place of business located in the town of Hammond, State of Oregon.

Respondent Trubenbach & Scheffold, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 100 Hudson Street, in the city of New York, State of New York.

Respondents Edward H. Trubenbach and Joseph W. Scheffold are individuals and are officers of respondent Trubenbach & Scheffold, Inc., with their office and principal place of business located at 100 Hudson Street in the city of New York, State of New York.

2. Pursuant to the provisions of subsections (c) and (d) of Section 2 of the Clayton Act, as amended (U.S.C., Title 15, §13), the Federal Trade Commission, on July 23, 1958, issued its complaint in this proceeding against respondents, and a true copy was thereafter duly served on respondents.

3. Respondents admit all the jurisdictional facts alleged in the complaint and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

4. This agreement disposes of all of this proceeding as to all parties.

5. Respondents waive:

(a) Any further procedural steps before the hearing examiner and the Commission;

(b) The making of findings of fact or conclusions of law; and

(c) All of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

6. The record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement.

7. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the decision of the Commission.

8. This agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

9. The following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondents. When so entered it shall have the same force and effect as if entered after a full hearing. It may be altered, modified, or set aside in the manner provided for other orders. The complaint may be used in construing the terms of the order.

Upon due consideration of the complaint filed herein and the said "Agreement Containing Consent Order to Cease and Desist," the latter is hereby approved, accepted and ordered filed, the same not to become a part of the record herein, however, unless and until it becomes a part of the decision of the Commission. The hearing examiner finds from the complaint and the said "Agreement Containing Consent Order to Cease and Desist" that the Commission has jurisdiction of the subject matter of this proceeding and of the persons of each of the respondents herein; that the complaint states a legal cause for complaint under the Clayton Act, as amended, against each of the respondents both generally and in each of the particulars alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said agreement is appropriate for the just disposition of all of the issues in this proceeding as to all of the parties hereto; and that said order therefore should be, and hereby is, entered as follows:

Order

55 F.T.C.

ORDER

It is ordered, That Point Adams Packing Co., a corporation, and its officers, and Charles L. Rogers, Sr., individually and as an officer of said corporation, and respondents' agents, representatives, or employees, directly or through any corporate or other device in connection with the sale of seafood products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

1. Paying, granting, or allowing, directly or indirectly to any buyer, or to anyone acting for or in behalf of, or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any sale of seafood products to such buyer for his own account.

2. Making or contracting to make, to or for the benefit of any customer, any payment of anything of value as compensation or in consideration for any advertising or promotional allowances, or other services or facilities furnished by or through such customer, in connection with the handling, offering for resale, or resale of seafood products sold to him by respondents, unless such payment is affirmatively offered or otherwise made available on proportionally equal terms to all other customers competing in the distribution or resale of such seafood products.

It is further ordered, That Trubenbach & Scheffold, Inc., a corporation, and its officers, and Edward H. Trubenbach and Joseph W. Scheffold, individually and as officers of said corporation, and respondents' agents, representatives, or employees, directly or through any corporate or other device in connection with the sale of seafood or other food products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

Paying, granting, or passing on, either directly or indirectly to any buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, all or any part of brokerage earned or received by respondents on sales made for their packer-principals, by allowing to buyers lower prices which reflect all or any part of such brokerage, or by granting them promotional, advertising, or other allowances or rebates out of said earned brokerage, or as payment in lieu of brokerage, or by any other method or means.

DECISION OF THE COMMISSION AND ORDER TO FILE
REPORT OF COMPLIANCE

The Commission having considered the hearing examiner's initial decision herein, filed October 15, 1958, wherein the hearing examiner accepted an agreement containing a consent order to cease and desist, theretofore executed by the respondents and counsel in support of the complaint, and entered his order in conformity therewith; and

It appearing that through inadvertence the initial decision fails to recite that the complaint alleges a violation by the respondents of subsection (d) of Section 2 of the Clayton Act, as amended, as well as a violation of subsection (c) of said Section 2; and

The Commission being of the opinion that this omission should be supplied:

It is ordered, That the initial decision be, and it hereby is, modified by striking therefrom the first sentence and substituting therefor the following:

"The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) issued its complaint herein, charging the above-named respondents with having violated the provisions of subsections (c) and (d) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13)."

It is further ordered, That the initial decision, as so modified, shall, on the 5th day of December 1958, become the decision of the Commission.

It is further ordered, That the respondents, Point Adams Packing Co., a corporation, and Charles L. Rogers, Sr., individually and as an officer of said corporation, and Trubenbach & Scheffold, Inc., a corporation, and Edward H. Trubenbach and Joseph W. Scheffold, individually and as officers thereof, shall, within sixty (60) days after service upon them of this decision, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order contained in the aforesaid initial decision.

Order

55 F.T.C.

IN THE MATTER OF
RESERVE LIFE INSURANCE COMPANY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket 6250. Complaint, Oct. 14, 1954—Order, Dec. 10, 1958

Order vacating and setting aside initial decision filed prior to the *per curiam* opinion of the Supreme Court in the combined cases of *Federal Trade Commission v. National Casualty Company* and *Federal Trade Commission v. The American Hospital and Life Insurance Company*, 357 U.S. 560, in proceeding charging a Dallas, Tex., insurance company with misrepresenting the benefits provided by its accident and health insurance policies.

FINAL ORDER

This matter having come on to be heard by the Commission upon the cross-appeals of respondent and counsel in support of the complaint from the hearing examiner's initial decision filed prior to the *per curiam* opinion of the United States Supreme Court in the combined cases of *Federal Trade Commission v. National Casualty Company* and *Federal Trade Commission v. The American Hospital and Life Insurance Company*, 357 U.S. 560 (decided June 30, 1958); and

Counsel for respondent additionally having filed a motion to dismiss the complaint, based upon the aforesaid decision of the Supreme Court, which motion is not opposed by counsel in support of the complaint; and

The Commission having considered respondent's motion to dismiss and the record, and having concluded that this proceeding should be dismissed on jurisdictional grounds upon the authority of the said ruling of the Supreme Court:

It is ordered, That the initial decision herein be, and it hereby is, vacated and set aside.

It is further ordered, That the complaint in this proceeding be, and it hereby is, dismissed.